



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JUL 16 2013

Tulsi Gabbard
Tulsi for Hawai'i
PO Box 75561
Kapolei, HI 96707

RE: MUR 6607


Dear Ms. Gabbard:

This is in reference to the complaint you filed with the Federal Election Commission ("Commission") on July 17, 2012, concerning the Hawai'i Lodging & Tourism Association ("HLTA"), Muliufi F. "Mufi" Hannemann, and Hannemann for Congress ("Committee"). On July 9, 2013, on the basis of the information provided in your complaint and by the respondents, the Commission found that there is no reason to believe that HLTA, Hannemann, and the Committee violated 2 U.S.C. § 441b(a) with respect to Hannemann's salary from HLTA and press coverage. Also on that date, the Commission determined to dismiss the remaining allegations in this matter and, accordingly, closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analyses, which more fully explain the Commission's findings, are enclosed. The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

Sincerely,

Daniel A. Petalas
Associate General Counsel

BY: 
Mark D. Shonkwiler
Assistant General Counsel

Enclosures
Factual and Legal Analyses

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Muliufi F. "Mufi" Hannemann MUR: 6607
Hannemann for Congress and
Colin Ching in his official
capacity as treasurer¹

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Tulsi Gabbard. *See* 2 U.S.C. § 437(g)(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Muliufi F. "Mufi" Hannemann was an unsuccessful candidate in the August 11, 2012, Hawaii primary election for the Democratic nomination for the state's Second Congressional District. His principal campaign committee is Hannemann for Congress, and Colin Ching is its current treasurer (collectively, the "Committee"). Hannemann and the Committee filed Statements of Candidacy and Organization on September 6, 2011.

The Hawai'i Lodging and Tourism Association ("HLTA") incorporated as a non-profit corporation in 1947, and is registered with the Internal Revenue Service ("IRS") as a section 501(c)(6) association. *See* Hawaii Department of Commerce and Consumer Affairs; 2009 IRS Form 990.²

Hannemann was the president and CEO of HLTA from January 2011 until his resignation, effective July 8, 2012. The Complaint's allegations concern the period during which

¹ On February 22, 2013, Hannemann for Congress submitted an amended Statement of Organization naming Colin Ching as its new treasurer in place of Mary Patricia Waterhouse. Statement of Organization (Feb. 22, 2013).

² Before October 1, 2011, HLTA conducted business under the name "Hawai'i Hotel & Lodging Association." Accordingly, its 2009 Form 990 was filed under this name.

Hannemann was both a federal candidate and president and CEO of HLTA, and fall into three broad categories: (1) travel; (2) HTLA activities and salary; and (3) reporting of expenditures.

1. Travel

The Complaint alleges that the Committee violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to report expenditures for campaign travel. Hannemann traveled extensively during the period when he was both a congressional candidate and the president and CEO of HLTA. Hannemann asserts that this travel "was paid in conjunction with his business responsibilities as president and CEO of [HLTA], which has a chapter in each of the four counties." Comm. Resp. at 1 (Aug. 8, 2012).

On September 15, 2011, the Committee sent an e-mail to its supporters stating that, "over the past few weeks, our campaign has traveled to every county of the state" ³ Compl. ¶ 5, Ex. A. Additionally, a local news blog, the *Honolulu Civil Beat*, reported on a March 21, 2012, fundraiser hosted by Hannemann in Guam, but the Committee's 2012 April Quarterly Report does not disclose any disbursements for travel to Guam. Compl., Ex. E.

The Committee did not disclose any disbursements for travel on its 2011 October Quarterly Report, and the Committee disclosed what the Complaint asserts are only some of its travel disbursements on its 2011 Year End Report. See 2011 October Quarterly Report; 2011 Year End Report; Compl. ¶ 6.

The Committee acknowledges that its September 15, 2011, e-mail could be "misconstrued as major [campaign] activity," but asserts that "what actually happened was Mr.

³ Around the same time, various news sources and Hannemann's personal Twitter account, <https://twitter.com/MnfiHannemann>, began reporting on Hannemann's intra-state travel. For example, on August 23, 2011, the *Hawaii Tribune Herald* reported that "former Honolulu Mayor Mufi Hannemann" was in attendance at "a political event" in Hilo, and on September 16, 2011, the *Garden Island News* reported that Hannemann "distributed checks to non-profits on Kauai." Compl., Ex. C (listing contemporaneous press and twitter references to travel). Hannemann's personal Twitter account details his travel to events such as the Hawaii County Fair (Sept. 17, 2011) and the Molokai Christmas Lights Parade (Dec. 3, 2011). *Id.*

1 Hannemann met or called on some supporters in each county while there on business or personal
2 travel.” Comm. Resp. at 1. The Committee characterizes Hannemann’s campaign activity as
3 “incidental” to his business or personal travel: “Insofar as Mr. Hannemann was on a particular
4 island for non-campaign purposes, and incurred no costs in meeting or calling his friends, the
5 campaign did not incur any reportable expenses.” *Id.*

6 Regarding the March 21, 2012, Guam fundraiser in particular, the Committee asserts that
7 Hannemann used his own personal airline miles to pay for his round-trip airfare and the
8 Committee paid for his hotel accommodations (as well as the event itself) at Fiesta Resort Guam.
9 *Id.* at 2. The Committee’s 2012 April Quarterly Report discloses a March 30, 2012,
10 disbursement of \$1,169.20 made to Fiesta Resort Guam.

11 2. HLTA Activity and Salary

12 During the period in which he was both a federal candidate and the paid president and
13 CEO of HLTA, Hannemann appeared as an HLTA spokesman: (1) on Channel 9’s “Hawaii
14 News Now” morning shows, on a regular basis; (2) in televised public service announcements
15 (“PSAs”) paid for by HLTA; and (3) in a full-page advertisement in the *Honolulu Star-*
16 *Advertiser* on July 6, 2012, promoting the “Visitor Industry Charity Walk.” Compl. ¶¶ 9-10,
17 Ex. I. The Complaint alleges that these appearances resulted in the Committee accepting
18 prohibited corporate contributions from HLTA. Compl. ¶¶ 9-10.

19 The Committee responds that, as the president and CEO of HLTA, Hannemann’s duties
20 were to fulfill the mission and goals of the organization, which included advocating for its
21 members and “provid[ing] educational opportunities, timely information, and appropriate
22 resources to members, legislators, the news media, and community.” Comm. Resp. at 2-3. The
23 Committee maintains that the advertisements and news appearances were essential to his duties

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1 and that he had been making these announcements and appearances since he took the position in
2 January 2011. Comm. Resp. at 2.

3 The Complaint also alleges that HLTA's payment of Hannemann's salary while he was
4 "campaigning full-time" constitutes a prohibited corporate contribution from HLTA, speculating
5 that Hannemann was "certainly not working the same number of hours." Compl. ¶ 9. In
6 response, the Committee asserts this allegation is not supported by any facts. Comm. Resp. at 3.
7 The Response claims that HLTA's Board of Directors would have asked Hannemann to resign if
8 he were not fulfilling his duties, and references an editorial written by HLTA's chairman of the
9 board titled, "Hannemann Championed Tourism at a Critical Time." Cmte. Resp. at 3, Ex. B.

10 3. Failure to Properly Report Expenditures

11 The Committee has filed regular disclosure reports since its formation. The Complaint
12 alleges that the Committee failed to properly disclose expenditures for polling and credit card
13 payments. Compl. ¶¶ 11-12.

14 The Honolulu firm QMark Research ("QMark") conducted two polls for the Committee
15 — one in late August 2011 and another in late January 2012 — as part of a "two-poll package."
16 Comm. Resp. at 3. The Committee states that it subsequently made two payments to QMark of
17 \$5,130.89 each on March 29 and April 21, 2012. *Id.* These are disclosed on the Committee's
18 2012 April Quarterly and July Quarterly Reports. The Complaint alleges that: (1) this amount is
19 "clearly under the market value for such polling services;" and (2) the Committee failed to report
20 a disbursement for a QMark poll conducted between July 28 and August 1, 2011, on its 2011
21 October Quarterly Report. Compl. ¶ 11, Ex. H.⁴ As to the polls' market value, the Committee

⁴ Exhibit H appears to be a summary of QMark's August 2011 poll, indicating that the poll consisted of 400 telephone interviews testing Hannemann's favorability score and his chances of winning the Democratic Primary and General Election. Compl., Ex. H.

1 asserts that the Complaint's allegation that they are worth more than \$10,261.78 is "completely
2 without merit," and "seems to have been made without any knowledge of the scope of the polls
3 in question, or the services actually offered." Comm. Resp. at 3.

4 The Committee also disclosed three disbursements to First Hawaiian Bank with a listed
5 purpose of "Credit card payment — some memoed [*sic*] items under \$200" on its 2012 April
6 Quarterly Report: (1) \$880.29 on January 12, 2012; (2) \$9,023.75 on February 17, 2012; and
7 (3) \$1,743.21 on March 19, 2012. 2012 April Quarterly Report. Following each of these
8 disclosed disbursements is the itemization of the credit card payment, disclosed as disbursements
9 with the note "[MEMO ITEM]." *Id.* The Complaint alleges that the Committee failed to
10 properly itemize these expenditures. Compl. ¶ 12.

11 Regarding the disbursements to First Hawaiian Bank, the Committee acknowledges that
12 two credit card charges exceeding \$200 were inadvertently left off of the 2012 April Quarterly
13 Report. Comm. Resp. at 3. The Committee explains that it experienced a problem with the way
14 its reporting software extracted data about credit card payments that "cross quarters," but that the
15 Committee is now reviewing its credit card payments for past quarters and will amend the
16 relevant reports. *Id.* at 3-4. The Response also includes a detailed list of the associated charges
17 for each credit card payment at issue in this matter. Comm. Resp., Ex. C.

18 **B. Legal Analysis**

19 A "contribution" includes any gift, subscription, loan, advance, or deposit of money or
20 anything of value made by any person for the purpose of influencing a federal election. 2 U.S.C.
21 § 431(8). Commission regulations define "anything of value" to include in-kind contributions,
22 including the provision of goods or services without charge or at a charge that is less than the
23 usual and normal charge for such goods or services. 11 C.F.R. § 100.52(d). It is unlawful for

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1 any corporation to make a contribution in connection with any election to any federal office, and
2 unlawful for any political committee knowingly to accept such a contribution. 2 U.S.C.
3 § 441b(a).

4 The Act requires that political committees disclose the total amount of all receipts,
5 including contributions from the candidate; the total amount of all expenditures made to meet
6 candidate or committee operating expenses, including payments for campaign-related travel; and
7 the amount and nature of outstanding debts and obligations owed by the committee. 2 U.S.C.
8 § 434(b)(2), (4), (8).

9 1. Travel

10 Hannemann characterizes his campaign activity in the weeks leading up to the
11 September 15, 2011, e-mail as “incidental” to his business travel on behalf of HLTA. *See supra*
12 p. 3. Candidate travel that combines campaign activity with business activities not related to the
13 campaign and personal activities (“mixed use travel”) is subject to Commission regulations
14 regarding both the personal use of campaign funds and expense allocation.

15 In cases where travel involves both personal and campaign activities, Commission
16 regulations on personal use provide that the incremental expenses that result from personal
17 activities are personal use, unless the person benefiting from the use reimburses the campaign
18 account within 30 days for the amount of the incremental expenses. 11 C.F.R.
19 § 113.1(g)(1)(ii)(C).

20 The Commission historically has considered the costs of airfare to travel to a single
21 location for mixed use to be “a defined expense” and not subject to the incremental expense
22 approach. *See* Advisory Op. 2002-05 (Hutchinson) at 5; Factual & Legal Analysis at 5,
23 MUR 6127 (Obama for America). Applying 2 U.S.C. § 439a(b), the Commission has assessed

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1 whether the expense would have occurred irrespective of the candidate's campaign to determine
2 whether airfare should be paid in full from personal or campaign funds. *See* F&LA, MUR 6127
3 (concluding that, because the President's travel to Hawaii would have occurred irrespective of
4 the campaign, he should have reimbursed his campaign for the airfare under § 439a(b));
5 Advisory Op. 2002-05 (concluding that the airfare of an official traveling for business, personal,
6 and campaign reasons would have occurred irrespective of any campaign activity and therefore
7 none of the airfare must be paid for by the campaign). *But see* Advisory Op. 2011-02 (Brown)
8 (Commission did not reach agreement on whether a candidate's publisher could pay the travel
9 costs for the candidate to both promote his book and hold fundraisers in the same city).

10 The statements posted on Hannemann's Twitter account — both cited in the Complaint
11 and others — paint a picture of Hannemann attending numerous events across the state in
12 support of the tourism industry, ranging from county fairs to birthday parties to the various
13 islands' HLTA-sponsored charity walks. *See generally* <https://twitter.com/MufiHannemann>;
14 Compl., Ex. C. Notwithstanding the Committee's September 15, 2011, e-mail, it appears that the
15 travel detailed in the referenced media sources would have occurred irrespective of
16 Hannemann's campaign. Although the *Hawaii Tribune* article cited in Complaint Exhibit C
17 references Hannemann attending a "political event in Hilo," there is no information that
18 Hannemann attended this event on behalf of his campaign rather than in his capacity as a party
19 leader and the former mayor of Honolulu. Similarly, the *Garden Island* article cited in the
20 Complaint detailing Hannemann's distribution of checks to local non-profits explains that
21 Hannemann was distributing funds raised by HLTA's 2011 Charity Walk.

22 Where Hannemann's Twitter account does suggest campaign-related travel — for
23 example, a tweet about a campaign kick-off event at the Jailhouse Pub and Grill in Kauai on

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1 November 14, 2011 — it appears that the Committee disclosed the related disbursements: its
2 2011 Year End Report discloses a \$187.41 disbursement for inter-island travel on November 13,
3 2011, and a disbursement of \$613.21 to Jailhouse Pub on November 14, 2011.

4 In sum, the Committee's assertions that Hannemann's campaign activity was merely
5 "incidental" to his business obligations during most of his inter-island travel is substantially
6 corroborated by the public contemporaneous diary that he maintained as his Twitter account. It
7 also appears that the travel involving significant campaign activity was disclosed on the relevant
8 disclosure reports. Although not all of the details of Hannemann's travel schedule from
9 September 6, 2011, to July 8, 2012, are available, the available information suggests that the
10 travel not disclosed by the Committee would have occurred irrespective of Hannemann's
11 candidacy, and therefore did not need to be funded or reported by the Committee.

12 A definitive conclusion would require a detailed investigation into the booking and
13 scheduling of Hannemann's travel; however, such an investigation does not appear warranted in
14 light of the available information and the Commission's limited resources. Therefore, the
15 Commission dismissed both the allegation that Hannemann and the Committee violated 2 U.S.C.
16 § 441b(a) by accepting a corporate contribution from HLTA in the form of Hannemann's travel,
17 and the allegation that the Committee violated 2 U.S.C § 434(b) by failing to report this travel.

18 2. HLTA Activities and Salary

19 a. News Show Appearances

20 Hannemann's appearances on Channel 9's "Hawaii News Now" morning shows were not
21 paid for by HLTA. Commission regulations exempt from the definition of "contribution" any
22 costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
23 station, unless the facility is owned or controlled by any political party, political committee, or

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1 candidate. 11 C.F.R. § 100.73. The Commission conducts a two-step analysis to determine
2 whether this “press exemption” applies in a given situation: (1) it asks if the entity is a press
3 entity as described by the Act and regulations; and (2) it asks whether the press entity is owned
4 or controlled by a political party, political committee, or candidate, and, if not, whether the press
5 entity is acting as a press entity in conducting the activity at issue (whether it is acting in its
6 “legitimate press function”). *See* Advisory Op. 2005-16 (Fired Up!); *Reader’s Digest*
7 *Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

8 In this matter, it appears that Channel 9’s “Hawaii News Now” morning show is a
9 legitimate press entity acting in its legitimate press function; it is a broadcast station that does not
10 appear to be owned by any political party or committee, and its YouTube clips feature its
11 broadcasters interviewing various political figures, including Hannemann, about Hawaii’s
12 tourism and economy. Accordingly, the press exemption applies to Hannemann’s appearances
13 on “Hawaii News Now” on behalf of HLTA, and neither Hannemann nor the Committee
14 received a contribution in the form of press coverage on “Hawaii News Now.” Therefore, the
15 Commission found no reason to believe that Hannemann or the Committee violated 2 U.S.C.
16 § 441b(a) by accepting an in-kind corporate contribution in the form of press coverage.

17 **b. Coordinated Communications**

18 Hannemann appeared in several communications paid for by HLTA. *See supra* p. 3.
19 Expenditures made by any person in cooperation, consultation, or concert with, or at the request
20 or suggestion of a candidate, the candidate’s authorized political committee, or their agents, are a
21 contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B). When a person pays for a
22 communication that is coordinated with a candidate or his or her authorized committee, the

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1 communication is considered an in-kind contribution from that person to that candidate and is
2 subject to the limits, prohibitions, and reporting requirements of the Act. 11 C.F.R. § 109.21(b).

3 A communication is coordinated with a candidate, authorized committee, or agent thereof
4 if it meets the three-part test set forth in the Commission regulations: (1) it is paid for by a
5 person other than the candidate or authorized committee; (2) it satisfies one of the five content
6 standards in 11 C.F.R. § 109.21(c); and (3) it satisfies one of the conduct standards in 11 C.F.R.
7 § 109.21(d). *Id.* § 109.21(a).

8 Although the Complaint alleges that certain PSAs featuring Hannemann constitute
9 coordinated communications, it does not identify the PSAs or include any information
10 concerning their timing, subjects, or content in support of this allegation.⁵ A determination of
11 whether these PSAs satisfy the Commission's test for coordinated communications would
12 require investigation; the conclusory nature of the allegation, however, does not warrant
13 expending Commission resources to conduct such an investigation here.

14 The Complaint also alleges that a specific newspaper advertisement, which featured
15 Hannemann in relation to a charity event sponsored by HLTA, constitutes a coordinated
16 communication under the Commission's regulations. Pursuit of this allegation, however, would
17 not be an efficient use of the Commission's limited resources. The advertisement focuses
18 entirely on promoting a charity event; it does not "pertain[] to [Hannemann] . . . as a candidate."
19 Statement of Reasons, Comm'rs Walther, Petersen, Bauerly, Hunter, McGahn at 5, MUR 6020

⁵ While the Complaint states that the PSAs were "broadcast" and posted on Hannemann's YouTube channel, Facebook page, and Twitter account, a review of these websites reveals only one PSA, posted on all three sites on May 10, 2012, featuring Hannemann inviting viewers to the 2012 Visitor Industry Charity Walk. *See, e.g.,* <http://www.youtube.com/watch?v=2e7vBh6PnPk&list=UU5Amc2VJmmIQmEf05pDN5sw&index=12>. These internet postings do not constitute "public communications," and therefore do not in themselves satisfy the content prong. *See* 11 C.F.R. §§ 100.26, 109.21(c)(3). Furthermore, there is no additional evidence that the PSAs were "broadcast" outside these websites.

1 (Alliance for Climate Protection) (dismissing allegation of coordination where candidate
2 appeared in a charitable organization's ad that satisfied the content prong of the coordinated
3 communications test). The ad features a chart listing the total number of walkers and money
4 raised on each island's walk, multiple photographs of the participants from each island, and a
5 "Save the Date" announcement for the 2013 Visitor Industry Charity Walk. See Compl., Ex. I.
6 While the advertisement includes a photograph of Hannemann, he is identified only as the
7 "President and CEO" of HLTA, and he is standing between two other individuals who are
8 identified as the charity event's Honorary Chair and Chair. *Id.* Given the philanthropic nature of
9 the advertisement, the Commission dismissed the allegations that Hannemann and the
10 Committee violated 2 U.S.C. § 441b(a) by accepting a corporate contribution in the form of
11 coordinated communications.⁶ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

12 c. Salary

13 Commission regulations provide that compensation paid to a candidate by an employer
14 constitutes a contribution unless such payments are made irrespective of the candidacy, meaning:

- 15 1) the compensation results from *bona fide* employment that is genuinely independent of the
16 candidacy;
17

⁶ There is not enough information available to determine whether the Commission's safe harbor for commercial transactions that serve non-electoral business and commercial purposes is applicable to this advertisement. See *Coordinated Communications*, 75 Fed. Reg. 55,947, 55,959 (Sep. 15, 2010). That safe harbor covers public communications in which: (1) a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business; (2) the business existed prior to the candidacy; (3) the medium, timing, content, and geographic distribution of the public communication is consistent with public communications made prior to the candidacy; and (4) the public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office. 11 C.F.R. § 109.21(i). Specifically, we do not know whether the ad here "is consistent with public communications made prior to the candidacy." *Id.* In addition, in its 2010 coordinated communications rulemaking, the Commission considered whether to establish a parallel safe harbor for ads run "by certain tax-exempt nonprofit organizations in which Federal candidates and officeholders appear." 75 Fed. Reg. at 55,960. The Commission declined to do so, however, explaining that there "is no significant need" and that the "Commission retains its prosecutorial discretion to dismiss enforcement matters involving such communications." *Id.* (emphasis added).

- 1 2) the compensation is exclusively in consideration of services provided by the employee as
2 part of this employment; and
3
4 3) the compensation does not exceed the amount of compensation which would be paid to
5 any other similarly qualified person for the same work over the same period of time.
6
7 11 C.F.R. § 113.1(g)(6)(iii).

8 The available information suggests that HLTA paid Hannemann's salary irrespective of
9 his candidacy. Hannemann obtained his position as president and CEO of HLTA approximately
10 eight months before he became a candidate.⁷ The Committee makes specific assertions that
11 Hannemann never failed to fulfill his responsibilities. *See supra* p. 4. Moreover, the
12 Complaint's allegations that Hannemann did not fulfill his duties or provide the services for
13 which he was compensated are speculative. The allegations are also contradictory, in that they
14 provide evidence of Hannemann's news shows appearances, which indicate that he was working
15 on behalf of HLTA while also a candidate. Finally, the Complaint makes no specific allegation
16 that Hannemann's compensation exceeded the amount that would be paid to any other similarly
17 qualified person for the same work. Therefore, the Commission found no reason to believe that
18 Hannemann or the Committee violated 2 U.S.C. § 441b(a) by accepting a corporate contribution
19 in the form of Hannemann's salary.

20 3. Failure to Properly Report Expenditures

21 a. Travel: Guam Fundraiser

22 Commission regulations provide that campaign-related travel expenses paid for by a
23 candidate from personal funds constitute reportable expenditures. 11 C.F.R. § 106.3(b)(1). The
24 Committee acknowledges that Hannemann traveled to Guam for the purpose of attending a

⁷ *See, e.g.,* Second Gen. Counsel's Rpt. at 11, MUR 5571 (Tanonaka, *et al.*) (Commission took no further action where, among other factors, the contract between the candidate and his employer was ratified more than a year before the candidate announced his candidacy).

1 campaign fundraiser and, for that reason, Hannemann paid the airfare costs with his personal
2 miles. *See supra* p. 3. Because the trip appears to be entirely campaign-related, the Committee
3 should have reported the value of the airfare as an expenditure.

4 Commission regulations also provide that an individual, including a candidate, may
5 voluntarily spend up to \$1,000 for unreimbursed transportation expenses on behalf of the
6 campaign without making a contribution. 11 C.F.R. § 100.79. When an individual's payments
7 for such transportation exceed \$1,000 per candidate, per election, the payments in excess of
8 \$1,000 are considered contributions. *Id.*

9 The value of Hannemann's airfare from Hawaii to Guam is not provided. If it exceeded
10 \$1,000, the Committee should have disclosed that portion exceeding \$1,000 as a contribution
11 from Hannemann. Given that the value of Hannemann's airfare is unclear, and that any portion
12 exceeding \$1,000 is likely *de minimis*, the Commission dismissed these allegations.

13 b. Polling Expenses

14 Commission regulations provide that a written contract, promise, or agreement to make
15 an expenditure is an expenditure as of the date such contract, promise, or obligation is made.
16 11 C.F.R. § 100.112. The regulations also provide that a political committee can enter into an
17 agreement with a commercial vendor that full payment is not due until after the vendor provides
18 the goods or services to the political committee. *Id.* §§ 116.1(e), 116.3(a). This agreement
19 constitutes an extension of credit to the political committee. *Id.* § 116.1(e). Such an extension of
20 credit, when it exceeds \$500, must be reported as of the date on which the obligation is incurred.
21 *See id.* § 104.11.

22 The Committee may have entered such an agreement with QMark: it references a "two-
23 poll package" under which QMark conducted polls in August 2011 and March 2012, and the

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1 Committee paid \$5,130.89 each for the polls in March and April 2012. *See supra* p. 4. Given
2 that the amount at issue is limited and that the Committee disclosed its payments to QMark, the
3 Commission dismissed this allegation.

4 Regarding the allegation that the amounts disclosed for the polls are “under the market
5 value,” there is no information — in the Complaint or otherwise — to indicate that the polls cost
6 more than the amounts disclosed by the Committee. The Committee flatly denies the allegation,
7 and the conclusory nature of the allegation does not provide a sufficient basis to expend
8 Commission resources to investigate. Therefore, the Commission dismissed any allegation that
9 the Committee violated 2 U.S.C. §§ 434(b)(4) and 441b(a).

10 c. Credit Card Payments

11 A political committee must disclose payments made to a credit card company as a
12 disbursement. 2 U.S.C. § 434(b)(4). In the case of operating expenditures charged on a credit
13 card, a political committee must itemize a payment to a credit card company if the payment
14 exceeds the \$200 aggregate threshold for itemization provided in 11 C.F.R. § 104.3(b)(4).
15 Furthermore, the political committee must itemize, as a memo entry, any specific transaction
16 charged on a credit card if the payment to the actual vendor exceeds the \$200 threshold. *See*
17 *Campaign Guide for Congressional Candidates and Committees* at 100-101. The memo entry
18 must include the name and address of the vendor and the purpose and amount of the
19 disbursement. *Id.*

20 The Committee correctly reported most of its credit card transactions on its 2012 April
21 Quarterly Report; it itemized the credit card payments to First Hawaiian Bank that exceeded
22 \$200 and, except for two transactions, itemized the specific transactions on the credit card
23 exceeding \$200. The Committee failed to properly itemize two specific transactions on its credit

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- 1 card payment — \$200.12 to Hula Shores Restaurant and \$297.42 to Hotel Molokai. Given the
- 2 *de minimis* amount involved, however, the Commission exercised its prosecutorial discretion and
- 3 dismissed this allegation.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Hawai'i Lodging &
 Tourism Association

MUR: 6607

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Tulsí Gabbard. *See* 2 U.S.C.
§ 437(g)(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The Hawai'i Lodging & Tourism Association ("HLTA") is a "non-profit, statewide trade organization of lodging properties, lodging owners and management firms, suppliers, and related firms and individuals." HLTA Resp. at 1 (Aug. 8, 2012). Its mission is to "provide advocacy and education for the hospitality industry." *Id.* It incorporated as a non-profit corporation in 1947, and is registered with the Internal Revenue Service ("IRS") as a section 501(c)(6) association. *See* Hawaii Department of Commerce and Consumer Affairs; 2009 IRS Form 990.¹

Muliufi F. "Mufi" Hannemann was the president and CEO of HLTA from January 2011 until his resignation, effective July 8, 2012. He was also an unsuccessful candidate in the August 11, 2012, Hawaii primary election for the Democratic nomination for the state's Second Congressional District. His principal campaign committee is Hannemann for Congress, and Colin Ching is its current treasurer (collectively, the "Committee"). Hannemann and the Committee filed Statements of Candidacy and Organization on September 6, 2011.

¹ Before October 1, 2011, HLTA conducted business under the name "Hawai'i Hotel & Lodging Association." Accordingly, its 2009 Form 990 was filed under this name.

1 The Complaint's allegations concern the period during which Hannemann was both a
2 federal candidate and president and CEO of HLTA, and fall into two relevant categories:
3 (1) travel; and (2) HTLA activities and salary.

4 1. Travel

5 The Complaint alleges that the Committee violated the Federal Election Campaign Act of
6 1971, as amended, (the "Act") by failing to report expenditures for campaign travel. Hannemann
7 traveled extensively during the period when he was both a congressional candidate and the
8 president and CEO of HLTA. HLTA states that "[Hannemann's] duties and goals required that
9 he travel frequently to each of the state's islands for a variety of purposes." HLTA Resp. at 1.

10 On September 15, 2011, the Committee sent an e-mail to its supporters stating that, "over
11 the past few weeks, our campaign has traveled to every county of the state" ² Compl. ¶ 5,
12 Ex. A. The Committee did not disclose any disbursements for travel on its 2011 October
13 Quarterly Report, and the Committee disclosed what the Complaint asserts are only some of its
14 travel disbursements on its 2011 Year End Report. See 2011 October Quarterly Report; 2011
15 Year End Report; Compl. ¶ 6.

16 2. HLTA Activities and Salary

17 During the period in which he was both a federal candidate and the paid president and
18 CEO of HLTA, Hannemann appeared as an HLTA spokesman: (1) on Channel 9's "Hawaii
19 News Now" morning shows, on a regular basis; (2) in televised public service announcements
20 ("PSAs") paid for by HLTA; and (3) in a full-page advertisement in the *Honolulu Star-*

² Around the same time, various news sources and Hannemann's personal Twitter account, <https://twitter.com/MufiHannemann>, began reporting on Hannemann's intra-state travel. For example, on August 23, 2011, the *Hawaii Tribune-Herald* reported that "former Honolulu Mayor Mufi Hannemann" was in attendance at "a political event" in Hilo, and on September 16, 2011, the *Garden Island News* reported that Hannemann "distributed checks to non-profits on Kauai." Compl., Ex. C (listing contemporaneous press and twitter references to travel). Hannemann's personal Twitter account details his travel to events such as the Hawaii County Fair (Sept. 17, 2011) and the Molokai Christmas Lights Parade (Dec. 3, 2011). *Id.*

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1 *Advertiser* on July 6, 2012, promoting the "Visitor Industry Charity Walk." Compl. ¶¶ 9-10,
2 Ex. I. The Complaint alleges that these appearances resulted in the Committee accepting
3 prohibited corporate contributions from HLTA. Compl. ¶¶ 9-10. HLTA responds that, as the
4 president and CEO of HLTA, Hannemann was "charged with . . . serving as an advocate and
5 spokesman for the lodging and visitor industries [and] communicating our mission and goals to
6 the general public." HLTA Resp. at 1.

7 The Complaint also alleges that HLTA's payment of Hannemann's salary while he was
8 "campaigning full-time" constitutes a prohibited corporate contribution from HLTA, speculating
9 that Hannemann was "certainly not working the same number of hours." Compl. ¶ 9. In
10 response, HLTA asserts this allegation is not supported by any facts. HLTA. Resp. at 2.
11 According to HLTA, "as far as the HLTA Board of Directors is concerned, Mr. Hannemann did
12 an exceptional job as president and CEO throughout his 16-month tenure. He never failed to
13 fulfill his responsibilities and worked tirelessly on HLTA business affairs" *Id.*

14 **B. Legal Analysis**

15 A "contribution" includes any gift, subscription, loan, advance, or deposit of money or
16 anything of value made by any person for the purpose of influencing a federal election. 2 U.S.C.
17 § 431(8). Commission regulations define "anything of value" to include in-kind contributions,
18 including the provision of goods or services without charge or at a charge that is less than the
19 usual and normal charge for such goods or services. 11 C.F.R. § 100.52(d). It is unlawful for
20 any corporation to make a contribution in connection with any election to any federal office, and
21 unlawful for any political committee knowingly to accept such a contribution. 2 U.S.C.
22 § 441b(a).

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1 1. Travel

2 Candidate travel that combines campaign activity with business activities not related to
3 the campaign and personal activities ("mixed use travel") is subject to Commission regulations
4 regarding both the personal use of campaign funds and expense allocation.

5 In cases where travel involves both personal and campaign activities, Commission
6 regulations on personal use provide that the incremental expenses that result from personal
7 activities are personal use, unless the person benefitting from the use reimburses the campaign
8 account within 30 days for the amount of the incremental expenses. 11 C.F.R.

9 § 113.1(g)(1)(ii)(C).

10 The Commission historically has considered the costs of airfare to travel to a single
11 location for mixed use to be "a defined expense" and not subject to the incremental expense
12 approach. *See* Advisory Op. 2002-05 (Hutchinson) at 5; Factual & Legal Analysis at 5,
13 MUR 6127 (Obama for America). Applying 2 U.S.C. § 439a(b), the Commission has assessed
14 whether the expense would have occurred irrespective of the candidate's campaign to determine
15 whether airfare should be paid in full from personal or campaign funds. *See* F&LA, MUR 6127
16 (concluding that, because the President's travel to Hawaii would have occurred irrespective of
17 the campaign, he should have reimbursed his campaign for the airfare under § 439a(b));
18 Advisory Op. 2002-05 (concluding that the airfare of an official traveling for business, personal,
19 and campaign reasons would have occurred irrespective of any campaign activity and therefore
20 none of the airfare must be paid for by the campaign). *But see* Advisory Op. 2011-02 (Brown)
21 (Commission did not reach agreement on whether a candidate's publisher could pay the travel
22 costs for the candidate to both promote his book and hold fundraisers in the same city).

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1 The statements posted on Hannemann's Twitter account — both cited in the Complaint
2 and others — paint a picture of Hannemann attending numerous events across the state in
3 support of the tourism industry, ranging from county fairs to birthday parties to the various
4 islands' HLTA-sponsored charity walks. *See generally* <https://twitter.com/MufiHannemann>;
5 Compl., Ex. C. Notwithstanding the Committee's September 15, 2011, e-mail, it appears that the
6 travel detailed in the referenced media sources would have occurred irrespective of
7 Hannemann's campaign. Although the *Hawaii Tribune* article cited in Complaint Exhibit C
8 references Hannemann attending a "political event in Hilo," there is no information that
9 Hannemann attended this event on behalf of his campaign rather than in his capacity as a party
10 leader and the former mayor of Honolulu. Similarly, the *Garden Island* article cited in the
11 Complaint detailing Hannemann's distribution of checks to local non-profits explains that
12 Hannemann was distributing funds raised by HLTA's 2011 Charity Walk.

13 Where Hannemann's Twitter account does suggest campaign-related travel — for
14 example, a tweet about a campaign kick-off event at the Jailhouse Pub and Grill in Kauai on
15 November 14, 2011 — it appears that the Committee disclosed the related disbursements: its
16 2011 Year End Report discloses a \$187.41 disbursement for inter-island travel on November 13,
17 2011, and a disbursement of \$613.21 to Jailhouse Pub on November 14, 2011.

18 In sum, the public contemporaneous diary that Hannemann maintained as his Twitter
19 account supports a reasonable inference that Hannemann's campaign activity was merely
20 incidental to his business obligations during most of his inter-island travel. It also appears that
21 the travel involving significant campaign activity was disclosed on the relevant disclosure
22 reports. Although not all of the details of Hannemann's travel schedule from September 6, 2011,
23 to July 8, 2012, are available, the available information suggests that the travel not disclosed by

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1 the Committee would have occurred irrespective of Hannemann's candidacy, and therefore did
2 not need to be funded or reported by the Committee.

3 A definitive conclusion would require a detailed investigation into the booking and
4 scheduling of Hannemann's travel; however, such an investigation does not appear warranted in
5 light of the available information and the Commission's limited resources. Therefore, the
6 Commission dismissed the allegation that HLTA violated 2 U.S.C. § 441b(a) by making a
7 corporate contribution in the form of Hannemann's travel.

8 2. HLTA Activities and Salary

9 a. News Show Appearances

10 Hannemann's appearances on Channel 9's "Hawaii News Now" morning shows were not
11 paid for by HLTA. Commission regulations exempt from the definition of "contribution" any
12 costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
13 station, unless the facility is owned or controlled by any political party, political committee, or
14 candidate. 11 C.F.R. § 100.73. The Commission conducts a two-step analysis to determine
15 whether this "press exemption" applies in a given situation: (1) it asks if the entity is a press
16 entity as described by the Act and regulations; and (2) it asks whether the press entity is owned
17 or controlled by a political party, political committee, or candidate, and, if not, whether the press
18 entity is acting as a press entity in conducting the activity at issue (whether it is acting in its
19 "legitimate press function"). See Advisory Op. 2005-16 (Fired Up!); *Reader's Digest*
20 *Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

21 In this matter, it appears that Channel 9's "Hawaii News Now" morning show is a
22 legitimate press entity acting in its legitimate press function; it is a broadcast station that does not
23 appear to be owned by any political party or committee, and its YouTube clips feature its

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1 broadcasters interviewing various political figures, including Hannemann, about Hawaii's
2 tourism and economy. Accordingly, the press exemption applies to Hannemann's appearances
3 on "Hawaii News Now" on behalf of HLTA, and neither Hannemann nor the Committee
4 received a contribution in the form of press coverage on "Hawaii News Now." Therefore, the
5 Commission found no reason to believe that HLTA violated 2 U.S.C. § 441b(a) by making an in-
6 kind corporate contribution in the form of press coverage.

7 b. Coordinated Communications

8 Hannemann appeared in several communications paid for by HLTA. *See supra* pp. 2-3.
9 Expenditures made by any person in cooperation, consultation, or concert with, or at the request
10 or suggestion of a candidate, the candidate's authorized political committee, or their agents, are a
11 contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B). When a person pays for a
12 communication that is coordinated with a candidate or his or her authorized committee, the
13 communication is considered an in-kind contribution from that person to that candidate and is
14 subject to the limits, prohibitions, and reporting requirements of the Act. 11 C.F.R. § 109.21(b).

15 A communication is coordinated with a candidate, authorized committee, or agent thereof
16 if it meets the three-part test set forth in the Commission regulations: (1) it is paid for by a
17 person other than the candidate or authorized committee; (2) it satisfies one of the five content
18 standards in 11 C.F.R. § 109.21(c); and (3) it satisfies one of the conduct standards in 11 C.F.R.
19 § 109.21(d). *Id.* § 109.21(a).

20 Although the Complaint alleges that certain PSAs featuring Hannemann constitute
21 coordinated communications, it does not identify the PSAs or include any information

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1 concerning their timing, subjects, or content in support of this allegation.³ A determination of
2 whether these PSAs satisfy the Commission's test for coordinated communications would
3 require investigation; the conclusory nature of the allegation, however, does not warrant
4 expending Commission resources to conduct such an investigation here.

5 The Complaint also alleges that a specific newspaper advertisement, which featured
6 Hannemann in relation to a charity event sponsored by HLTA, constitutes a coordinated
7 communication under the Commission's regulations. Pursuit of this allegation, however, would
8 not be an efficient use of the Commission's limited resources. The advertisement focuses
9 entirely on a charity event; it does not "pertain[] to [Hannemann] . . . as a candidate." Statement
10 of Reasons, Comm'rs Walther, Petersen, Bauerly, Hunter, McGahn at 5, MUR 6020 (Alliance
11 for Climate Protection) (dismissing allegation of coordination where candidate appeared in a
12 charitable organization's ad that satisfied the content prong of the coordinated communications
13 test.) The ad features a chart of the total number of walkers and money raised on each island's
14 walk, multiple photographs of the participants from each island, and a "Save the Date"
15 announcement for the 2013 Visitor Industry Charity Walk. *See* Compl., Ex. I. While the
16 advertisement includes a photograph of Hannemann, he is identified only as the "President and
17 CEO" of HLTA, and he is standing between two other individuals who are identified as the
18 charity event's Honorary Chair and Chair. *Id.* Given the philanthropic nature of the
19 advertisement, the Commission dismissed the allegation that HLTA violated 2 U.S.C. § 441b(a)

³ While the Complaint states that the PSAs were "broadcast" and posted on Hannemann's YouTube channel, Facebook page, and Twitter account, a review of these websites reveals only one PSA, posted on all three sites on May 10, 2012, featuring Hannemann inviting viewers to the 2012 Visitor Industry Charity Walk. *See, e.g.*, <http://www.youtube.com/watch?v=2e7vBh6PnPk&list=UU5Amc2VJmmIOmEf05pDN5sw&index=12>. These internet postings do not constitute "public communications," and therefore do not in themselves satisfy the content prong. *See* 11 C.F.R. §§ 100.26, 109.21(c)(3). Furthermore, there is no additional evidence that the PSAs were "broadcast" outside these websites.

1 by making a corporate contribution in the form of coordinated communications.⁴ *See Heckler v.*
2 *Chaney*, 470 U.S. 821, 831 (1985).

3 c. Salary

4 Commission regulations provide that compensation paid to a candidate by an employer
5 constitutes a contribution unless such payments are made irrespective of the candidacy, meaning:

- 6 1) the compensation results from *bona fide* employment that is genuinely independent of the
7 candidacy;
8
9 2) the compensation is exclusively in consideration of services provided by the employee as
10 part of this employment; and
11
12 3) the compensation does not exceed the amount of compensation which would be paid to
13 any other similarly qualified person for the same work over the same period of time.
14

15 11 C.F.R. § 113.1(g)(6)(iii).

16 The available information suggests that HLTA paid Hannemann's salary irrespective of
17 his candidacy. Hannemann obtained his position as president and CEO of HLTA approximately
18 eight months before he became a candidate.⁵ HLTA makes specific assertions that Hannemann
19 never failed to fulfill his responsibilities. *See supra* p. 3. Moreover, the Complaint's allegations
20 that Hannemann did not fulfill his duties or provide the services for which he was compensated

⁴ There is not enough information available to determine whether the Commission's safe harbor for commercial transactions that serve non-electoral business and commercial purposes is applicable to this advertisement. *See Coordinated Communications*, 75 Fed. Reg. 55,947, 55,959 (Sep. 15, 2010). That safe harbor covers public communications in which: (1) a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business; (2) the business existed prior to the candidacy; (3) the medium, timing, content, and geographic distribution of the public communication is consistent with public communications made prior to the candidacy; and (4) the public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office. 11 C.F.R. § 109.21(i). Specifically, we do not know whether the ad here "is consistent with public communications made prior to the candidacy." *Id.* In addition, in its 2010 coordinated communications rulemaking, the Commission considered whether to establish a parallel safe harbor for ads run "by certain tax-exempt nonprofit organizations in which Federal candidates and officeholders appear." 75 Fed. Reg. at 55,960. The Commission declined to do so, however, explaining that there "is no significant need" and that the "Commission retains its prosecutorial discretion to dismiss enforcement matters involving such communications." *Id.* (emphasis added).

⁵ *See, e.g.*, Second Gen. Counsel's Rpt. at 11, MUR 5571 (Tamonaka, *et al.*) (Commission took no further action where, among other factors, the contract between the candidate and his employer was ratified more than a year before the candidate announced his candidacy).

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1 are speculative. The allegations are also contradictory, in that they provide evidence of
2 Hannemann's news shows appearances, which indicate that he was working on behalf of HLTA
3 while also a candidate. Finally, the Complaint makes no specific allegation that Hannemann's
4 compensation exceeded the amount that would be paid to any other similarly qualified person for
5 the same work. Therefore, the Commission found no reason to believe that HLTA violated
6 2 U.S.C. § 441b(a) by making a corporate contribution in the form of Hannemann's salary.

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